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No. 03-636

In the
Supreme Court of the United States

GARRISON S. JOHNSON,

Petitioner,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

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MOTION FOR LEAVE TO FILE AND INTEREST OF AMICUS CURIAE

Pursuant to this Court's Rule 37, Pacific Legal Foundation respectfully requests leave of the Court to file this brief amicus curiae in support of neither party.[1] Consent for the filing of this brief has been granted by counsel for Petitioner, and has been lodged with the Clerk of this Court. Respondents, State of California, *et al.*, have withheld consent, necessitating the filing of this motion.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California, for the purpose of engaging in litigation in matters affecting the public interest. For thirty years, PLF has litigated, both directly and as amicus curiae, in both state and federal courts in numerous cases involving racial discrimination by the government. PLF has participated before this Court in such cases as *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Gratz v. Bollinger*, 539 U.S. 244 (2003); and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

PLF considers this case to be of special significance in that it concerns the government's authority to discriminate between individuals on the basis of race. Although it supports neither party, PLF believes that its extensive experience in cases involving racial discrimination, and the purpose and meaning of the Equal Protection Clause, will assist the Court in applying the proper level of scrutiny to the California policy of separating newly arrived prison inmates by race. Specifically, PLF will argue that the policy must be subjected to strict, non-deferential scrutiny, if the Equal Protection Clause is effectively

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[1] Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

to protect Americans from racial discrimination, and therefore that the California prison segregation policy must be narrowly tailored to advance a compelling government interest. PLF takes no position, however, on whether the policy actually satisfies strict scrutiny.

In recent years, courts have begun deferring to the decisions of administrators and policy makers, even while claiming to apply strict scrutiny. But history—as well as recent experience—reveals that deferring in the context of strict scrutiny allows invidious racial discrimination to proliferate in spite of the clear command of the Constitution that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. This amicus brief will argue that the Court should apply the most rigid scrutiny to the California prison policy, and not defer to the expertise of, or the burdens on, administrators or policy makers. Amicus Pacific Legal Foundation believes it can add insight as to why it is important for this Court to clarify and uphold the nondeferential requirements of strict scrutiny, and respectfully requests that this motion to file a brief amicus curiae be *granted*.

DATED: May, 2004.

Respectfully submitted,

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QUESTION PRESENTED

1. Is a state's practice of routine racial segregation of incoming prisoners for at least a 60-day period subject to the same strict scrutiny generally applicable to all other challenges to intentional racial segregation, or is it excused from such scrutiny and subject only to the more relaxed review afforded by *Turner v. Safley*, 482 U.S. 78 (1987)?

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INTRODUCTION AND SUMMARY OF ARGUMENT

This Court long ago declared that when government discriminates between people on the basis of race, its decisions are subject to the most exacting judicial scrutiny. *Korematsu v. United States*, 323 U.S. 214 (1944). This country's sad history of government-sponsored racial discrimination and oppression demands that courts carefully review discriminatory state policies. The fact that the Equal Protection Clause was adopted precisely to bar government from engaging in such discrimination—and the fact that even where discriminatory policies are well intended, they can easily be abused—also underline the need for strict scrutiny.

Ironically, the same case that established the strict scrutiny standard, *Korematsu*, did not actually apply strict scrutiny, but instead deferred to the judgment of military commanders who decided to forcibly remove thousands of American citizens of Japanese descent to military detention centers. As this Court has noted, the application of deference in the midst of its allegedly strict scrutiny analysis allowed racial bigotry to evade the *Korematsu* Court's vigilance. That case vividly demonstrates that "[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236 (1995).

Unfortunately, recent years have revealed a disturbing trend away from genuine strict scrutiny analysis. In some cases, this and other courts have again begun to defer to the expertise of government administrators, or have deferred to their decisions out of a desire not to impose greater burdens on them. Such deference is appropriate in most cases, where administrators are acting within their workaday duties, which courts lack the expertise to supervise. But where, as here, administrators are engaged purely in overt racial discrimination, their actions must be reviewed under strict scrutiny.

Deference is incompatible with strict scrutiny analysis, and threatens the effectiveness of strict scrutiny as a mechanism for protecting individual rights and equal treatment. If the strict scrutiny standard is to continue to exert force—if it is not to become the sort of veritable blank check that "rational basis" stands for today—the Court must not permit this trend to continue.

This is not to say that the California policy necessarily violates of the Equal Protection Clause. In fact, Amicus Pacific Legal Foundation takes no position on whether the policy at issue *satisfies* the strict scrutiny standard. Cases have held that race-conscious policies satisfy this standard if they are sufficiently "limited in time." *Grutter v. Bollinger*, 123 S. Ct. 2325, 2346 (2003). The California policy only separates prisoners by race for 60 days, which might therefore satisfy strict scrutiny. On the other hand, other cases suggest that prison segregation policies must take account of particularized circumstances, which would suggest that the California policy is not sufficiently narrowly tailored. *See Sockwell v. Phelps*, 20 F.3d 187, 191 (5th Cir. 1994).

In either case, however, the California policy is racially discriminatory and must be examined under strict scrutiny. This case presents the Court a clear opportunity to declare that *Adarand*'s holding, that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny," 515 U.S. at 227, applies to racial discrimination in the context of prison regulations, despite the more deferential standard generally applied to prison regulations under *Turner v. Safley*, 482 U.S. 78 (1987). And it presents the Court with an opportunity to declare that strict scrutiny simply does not entail judicial deference.

ARGUMENT

I

STRICT SCRUTINY IS THE CORRECT APPROACH TO THE CONSTITUTIONAL PROBLEM OF RACIAL DISCRIMINATION IN THIS COUNTRY

Sixty years ago, this Court adopted strict scrutiny as its method of analyzing racial discrimination by the government. *Korematsu*, *supra*. It did so in part because of this nation's sorrowful history of racial discrimination and oppression, and in part because of the clear purpose of the Fourteenth Amendment's Equal Protection Clause: to end racial discrimination by the government in all walks of life. It is vital that this Court take and maintain a strong and consistent position that racial discrimination by the government is tolerable only in the rarest possible circumstances. Understanding that position requires a brief review of the history and purposes of the strict scrutiny standard.

A. This Court Adopted Strict Scrutiny to Put an End to Long-Standing Racial Abuses

Although the United States was founded on the principle that "all men are created equal," Declaration of Independence, 1 Stat. 1 (1776), it has a long history of racial violence and discrimination. The details of this troubling past have been described at length elsewhere. *See, e.g., Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 545-55 (2000). Suffice to say that no subject has divided this country more severely than race, and particularly, "the tragic legacy of government-sanctioned discrimination." *Fullilove v. Klutznick*, 448 U.S. 448, 516 (1980) (Powell, J., concurring) (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)).

With the ratification of the Fourteenth Amendment, the power of states to discriminate on the basis of race was

eliminated. It "nullifies and makes void all state legislation, and state action of every kind, which . . . denies to any of [the people] the equal protection of the laws." *Civil Rights Cases*, 109 U.S. 3, 11 (1883); *see also Strauder v. West Virginia*, 100 U.S. 303 (1879). The Equal Protection Clause was written to make good on what Martin Luther King, Jr., called the "promissory note" of the Declaration of Independence. Martin Luther King, Jr., *I Have A Dream, reprinted in A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.* 217 (J. Washington ed. 1986).

Although the Court allowed state racial discrimination to continue under the "separate but equal" doctrine in *Plessy, supra*, that doctrine became increasingly untenable to the Court. In a series of cases in the first half of the twentieth century, the Court placed heavier limits on government's power to discriminate. *See* John E. Nowak, et al., *Constitutional Law* 551-56 (1978).

In the meantime, however, the Court was adopting an increasingly deferential theory of judicial review. Some justices had long advocated an extreme degree of deference toward the Legislature. *See, e.g., Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("I think that the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion . . . ."); *Truax v. Corrigan*, 257 U.S. 312, 376 (1921) (Brandeis, J., dissenting) ("[I]in the interest of the public and in order to preserve the liberty and the property of the great majority of the citizens of a state, rights of property and the liberty of the individual must be remolded, from time to time, to meet the changing needs of society."). Gradually, this deference came to prevail. *See, e.g., Buck v. Bell*, 274 U.S. 200, 207 (1927) (deferring to Legislature's decision to "prevent those who are manifestly unfit from continuing their kind."); *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911) ("the police power . . . may be put forth in aid of what is . . . held by the prevailing

morality or strong and preponderant opinion to be greatly and immediately necessary . . . .").

In the 1930s, the Court decisively adopted a general rule of "extreme deference to the other branches of government." Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 Ohio St. L.J. 161, 161 (1984). It did this in part by embracing a presumption that legislation was constitutional, and requiring anyone challenging a law to meet a practically impossible burden by proving that the law cannot be constitutional. *See, e.g., Nebbia v. People of New York*, 291 U.S. 502, 537-38 (1934) ("the Legislature is primarily the judge of the necessity of such an enactment . . . [and] every possible presumption is in favor of its validity . . . ."); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) ("Even in the absence of [evidence], the existence of facts supporting the legislative judgment is to be presumed . . . .")

Some legal observers became concerned that this tendency to defer to the Legislature was going too far. Roscoe Pound, for instance, had initially endorsed this trend, but became increasingly concerned that deference was leading to the "disappearance of law because it is superseded by an omnicompetent administration," Roscoe Pound, *Contemporary Juristic Theory* 18 (1940), and the "revival of absolute government." *Id.* at 1. Thurgood Marshall, too, expressed concern that "[w]ith the appointment of what has become popularly known as the 'Roosevelt Court,' this weapon [of judicial review under the Due Process Clause] was laid aside . . . ." *The Supreme Court as Protector of Civil Rights: Equal Protection of the Laws* (1951), *reprinted in Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminiscences* 117 (Mark V. Tushnet ed. 2001). This was worrisome because the most important role of judicial review is "to guard the Constitution and the rights of individuals from the effects of . . . ill humors . . . [which can cause] serious

oppressions of the minor party in the community." *The Federalist No.* 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961). An overly deferential standard of review would be "tantamount to no review at all," *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring in judgment), and would effectively eliminate any protection of minorities against majority overreaching. Given the ubiquitousness of racial discrimination, the primary victims of an overly deferential standard of review, would be racial minorities.

Partly in response to this concern, in 1938, the Court hinted that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation [is motivated by] . . . prejudice against discrete and insular minorities . . . ." *Carolene Products*, 304 U.S. at 153 n.4. In the years following, the Court became increasingly willing to strike down racially discriminatory laws and practices. Thurgood Marshall and others welcomed this "change in trend" whereby "the Court has begun to look upon the protection of personal liberty as one of its primary functions." Tushnet, *supra* at 117.

In *Korematsu*, this Court expressed its concern with racial discrimination by developing the standard of "strict scrutiny":

> [A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

323 U.S. at 216.

Korematsu shifted the burden of justifying racial discrimination onto the government. *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964). This marked an intentional

withdrawal from the extreme deference of the decades before. But it was spurred by recognition that deference even to government officials who are experts can lead to unfair and unequal results.

It should be emphasized that this scrutiny focused on "specific [discriminatory] outcomes of the established political process" rather than on "institutional competence." Laurence Tribe, *American Constitutional Law* 1452-53 (2d ed. 1988). Focusing on the outcomes, that is, the purpose and effect of government action, and whether the "public necessity" *really is* "pressing"—rather than focusing on the expertise of, or the burdens on, government institutions, is vital to preventing unfair or pretextual discrimination. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) ("Though the law itself be . . . impartial in appearance, yet, if it is applied and administered . . . with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations . . . the denial of equal justice is still within the prohibition of the Constitution.").

B. The Strict Scrutiny Standard Is Appropriate In *All* Circumstances Where Government Is Discriminating on the Basis of Race

In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), this Court held that

> "a free people whose institutions are founded upon the doctrine of equality" should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly . . . all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.

The insidious nature of racial discrimination, and the clear intent of the Equal Protection Clause, both counsel for the strictest standard in such cases, "to distinguish legitimate from

illegitimate uses of race in governmental decisionmaking." *Id.* at 228. The Court explained that a nondeferential standard of review was necessary:

> "[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful . . . the reasons for any such classification [must] be clearly identified and unquestionably legitimate," and . . . "the most exact connection [must exist] between justification and classification." [R]equiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, *both as to ends and as to means* . . . . Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.

Id. at 236 (emphasis added) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 534-535 (1980) (Stevens, J., dissenting)).

The Court therefore focused its attention on the ends and means of the law, rather than on the expertise of, or the burden on, government agents. There are two primary reasons for this. First, "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). The Court must therefore focus on the "ends and means" of a challenged policy even where that policy might seem facially neutral. *Yick Wo*, 118 U.S. at 373-74. Were the Court to evaluate a race-based classification by deferring to government administrators, either because of their greater regulatory expertise or out of a hesitation to add to the difficulty of their jobs, it would be unable to prevent pretextual uses of race. "[U]nbounded

discretion carries with it grave potential for abuse." *Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, Stevens, Ginsburg, Breyer, JJ., dissenting).

Second, a nondeferential standard like strict scrutiny is warranted because the right to equal treatment is important enough to justify imposing extra burdens on government agents. For instance, in the cases enforcing its decision in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), this Court repeatedly rejected appeals by school boards and other administrators who tried to delay desegregation purportedly to prevent civil disorder or strain on schools. *See, e.g., Carter v. West Feliciana Parish School Board*, 396 U.S. 290, 290 (1970) (immediate desegregation required regardless of burden on government administrators); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 20 (1969) (per curiam) (same). *See also Rhem v. Malcolm*, 527 F.2d 1041, 1043-44 (2d Cir. 1975) (per curiam) ("[A]n individual's constitutional rights may not be sacrificed on the ground that the city has other and more pressing priorities.") As this Court has insisted,

> [p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held."

Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (quoting *Palmer v. Thompson*, 403 U.S. 217, 260-61 (1971) (White, J., dissenting)).

Nor does the fact that eliminating racial discrimination might increase the burden on government officials absolve them of the duty to treat people equally. *Watson v. City of Memphis*, 373 U.S. 526, 537 (1963) ("[V]indication of conceded constitutional rights cannot be made dependent upon any theory

that it is less expensive to deny than to afford them."); *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218, 234 (1964) (refusing to permit delays in desegregation); *Green v. County School Bd. of New Kent County*, 391 U.S. 430, 439 (1968) (same). *Cf. Bounds v. Smith*, 430 U.S. 817, 824 (1977) ("[O]ur decisions have consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts.").

The expertise of government agents is not grounds for deference in cases involving the most important constitutional guarantees. In *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979), a case challenging broadcasting regulations on Free Speech grounds, the Fifth Circuit noted that "[j]udicial deference to agency . . . decision-making is generally premised on the existence of agency expertise in a particular specialized or technical area. But in general, courts, not agencies, are expert on the First Amendment." The same is true of the Fourteenth Amendment.

Several cases have established that deferring to prison regulations is inappropriate where those regulations threaten constitutional rights. *See, e.g., Johnson v. Avery*, 393 U.S. 483, 486 (1969) ("[D]iscipline and administration of state detention facilities are state functions . . . subject to federal authority only where paramount federal constitutional or statutory rights supervene. [I]n instances where state regulations applicable to inmates . . . conflict with such rights, the regulations may be invalidated."); *Gates v. Collier*, 501 F.2d 1291, 1320 (5th Cir. 1974) ("[I]f the State chooses to run a prison it must do so without depriving inmates of the rights guaranteed to them by the federal Constitution."); *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) ("We are not convinced contrarily by any suggestion that the State needs this tool for disciplinary purposes and is too poor to provide other accepted means of prisoner regulation."); *McClelland v. Sigler*, 456 F.2d 1266, 1267 (8th Cir. 1972) ("[W]e are reluctant to interfere with the

operation of correctional institutions . . . [but the Constitution] compel[s] an end to this official policy of racial segregation. If disruptions . . . occur . . . administrators [must] take appropriate action against the offending inmates, black or white.").

Since the "clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States," *Loving v. Virginia*, 388 U.S. 1, 10-11 (1967), it is inappropriate for the Court to defer to the judgment of government administrators who discriminate.

In short, "it is the character of the right, not of the limitation, which determines what standard [of review] governs . . . ." *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (citing *Carolene Products*, 304 U.S. at 153 n.4). The history of racial discrimination and the clear command of the Equal Protection Clause counsel strongly in favor of a strict, nondeferential scrutiny focusing on the ends and means of government activity, whenever it discriminates on the basis of race.

II

DEFERRING TO THE EXPERTISE OF GOVERNMENT POLICYMAKERS WOULD UNRAVEL STRICT SCRUTINY IN THE ENTIRE FIELD OF EQUAL PROTECTION LAW

A. *Grutter's* Deferential Standard Threatens Strict Scrutiny

In *Grutter v. Bollinger*, 123 S. Ct. at 2337, this Court reiterated that strict scrutiny applies to all racial discrimination imposed by government. Unfortunately, the Court went on to defer to the expertise of the administrators who devised the discriminatory admissions plan at issue in that case. *See id.* at 2339, 2341. The contradictory nature of this strict scrutiny-plus-deference rule was pointed out by the dissenters and by commentators. *See, e.g., id.* at 2371 (Kennedy, J., dissenting)

("The majority today refuses to be faithful to the settled principle of strict review [for all racial classifications]."); *McConnell v. Federal Election Comm'n*, 124 S. Ct. 619, 734 n.6 (2003) (Thomas and Scalia, JJ., concurring in part and dissenting in part) ("The joint opinion continues yet another disturbing trend: the application of a complaisant level of scrutiny under the guise of 'strict scrutiny.' *See Grutter* . . . ."); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 105 (Cal. 2004) (Brown, J., dissenting) ("Strict scrutiny is not what it once was. Described in the past as 'strict in theory and fatal in fact,' it has mellowed in recent decades (*see, e.g., Grutter* . . . .)" (citation omitted). *See also* Libby Huskey, Note, *Affirmative Action in Higher Education: Strict in Theory, Intermediate in Fact?*, 4 Wyo. L. Rev. 439, 442 (2004) ("[A]ltering the strict scrutiny analysis in this manner served to confuse the decision and undermine the well-established strict scrutiny test."); Jerry R. Parkinson, *Admissions After* Grutter, 35 U. Tol. L. Rev. 159, 159 (2003) (expressing "surprise[ ] and disappoint[ment] . . . by the extraordinary deference the Court granted . . . despite supposedly applying a strict scrutiny standard . . . .").

Such deference threatens to undermine strict scrutiny analysis. Under strict scrutiny, a law is presumed unconstitutional, and it is the government's duty to rebut that presumption. *Miller v. Johnson*, 515 U.S. 900, 920 (1995) ("the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest."); *Accord, Burson v. Freeman*, 504 U.S. 191, 198 (1992). Deference is incompatible with strict scrutiny analysis because the whole point of strict scrutiny, especially in cases involving racial discrimination, is to shift the burden of proof onto the government. *See* Robert Carter and Thurgood Marshall, *The Meaning and Significance of the Supreme Court Decree* (1955), *reprinted in* Tushnet, *supra*, at 160 (praising *Brown v. Bd. of Educ.* for its "important shifting" of the burden of proof onto

government). But to defer to the judgment of government officials when they implement a racially discriminatory program threatens to shift the burden in the government's favor. *See Concrete Works of Colorado, Inc. v. City and County of Denver*, 124 S. Ct. 556, 560-61 (2003) (Scalia, J., and Rehnquist, C.J., dissenting from denial of certiorari) ("If the evidence relied upon by governmental units to justify their use of racial classifications can be as inconclusive as Denver's evidence in this case, our former insistence upon a 'strong basis in evidence' has been abandoned, to be replaced by what amounts to an 'apparent-good-faith' requirement . . . .").

The fundamental weakness in *Grutter* is revealed by comparing it with *Korematsu*. Although the *Korematsu* Court purportedly applied strict scrutiny to the racial classification at issue, it actually *deferred* to the judgment of military officials. *See, e.g.*, 323 U.S. at 218 ("'we cannot reject as unfounded the judgment of the military authorities and of Congress'" (quoting *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943))). The Court engaged in a minimal review of the record, *see* 323 U.S. at 219, and then refused to second-guess the determination of "the properly constituted military authorities" that interment of Japanese-Americans was an appropriate policy measure. *Id.* at 223-24.

By deferring to administrative judgment—despite its invocation of strict scrutiny—the *Korematsu* Court upheld a racially discriminatory program. As Justice O'Connor later explained in her opinion for the Court in *Adarand*, 515 U.S. at 236, "*Korematsu* demonstrates vividly that even 'the most rigid scrutiny' can sometimes fail to detect an illegitimate racial classification . . . . Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future." Unfortunately, like *Korematsu*, *Grutter* also retreated from searching inquiry, by choosing to defer to the judgment of the University of Michigan's administrators. This Court should not add to the erosion of

strict scrutiny by deferring to prison officials while claiming to apply strict scrutiny. Doing so would not only further confuse the method of varying standards of scrutiny, but would also lead to unwarranted expansion of government discrimination based on race.

B. Deference to the Expertise Of, or Burdens On, Government Agents Will Undermine the Fundamental Purposes of Strict Scrutiny

Under a system of *stare decisis*, courts must take care to ensure that the principle adopted in a particular case is drawn narrowly enough to avoid applying to inappropriate situations. If the Court adopts a vague rationale for its holding, later courts might too easily find that this rationale justifies far more extreme outcomes than the Court originally anticipated. *See* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 Harv. L. Rev. 1026, 1066 (2003) ("If *A* sets a precedent that embodies justification *J*, then lower courts in future cases may feel legally bound to apply *J* as well.").

The use of deference in *Grutter* threatens to become an example of this slippery slope mechanism. In that case, the Court "defer[red to t]he Law School's assessment that diversity will, in fact, yield educational benefits" for students. 123 S. Ct. at 2339. This would seem to limit the rationale of *Grutter* to educational institutions. Yet in the short time since *Grutter* was announced, lower courts have relied on it to uphold a number of racially discriminatory policies. In *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transp.*, 345 F.3d 964, 972 (8th Cir. 2003), the Eighth Circuit invoked *Grutter* to uphold racial discrimination in public works contracts. In *Berkley v. United States*, 59 Fed. Cl. 675, 683 (2004), the Court of Federal Claims suggested that *Grutter* would permit deference to racial discrimination by the military.

In *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 1424 (Apr. 19, 2004) (No. 03-1458), the Seventh Circuit Court of Appeals relied on *Grutter* to permit racial preferences in promoting police officers. Because *Grutter* "deferred to the law school's educational judgment" in creating racial preferences, *id.* at 1114, the Court of Appeals held that it was "[s]imilarly . . . proper in this case to rely on the views of experts and Chicago police executives that affirmative action was warranted to enhance the operations of the [police department]." *Id.*

Deference already has begun to unravel the strict scrutiny standard[2] and lead to the expansion of racial discrimination by government. If this Court is to maintain the effectiveness of the strict scrutiny standard, it must restrain the deference which that case applied to cases involving government racial discrimination.

C. Although Appropriate to a Limited Degree, Deference to Nonjudicial Branches Threatens to Undermine Judicial Review

Courts defer to nonjudicial branches for several reasons. First, courts are rarely in a position to assess all of the competing interests that political branches consider when devising policy. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364-65 (1973). Second, judicial intervention would risk transferring the Legislature's power to create policy to unaccountable federal courts. *Raines v. Byrd*, 521 U.S. 811, 828-29 (1997). Third, in many ways, the Constitution was written to accomplish purposes "principally [through] the workings of the . . . Government itself, rather than in discrete limitations on the objects of [government] authority" as enforced by courts. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 551 (1985). By balancing

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[2] In *Women's Medical Professional Corp. v. Taft*, 353 F.3d 436, 444 (6th Cir. 2003), the Sixth Circuit Court of Appeals even suggested that *Grutter* permitted "considerable deference" in the context of abortion regulations.

interest groups against one another and thus ensuring that they could not unite, the framers expected to prevent the oppression or exploitation of minorities. *See The Federalist No.* 51, at 324 (James Madison) (Clinton Rossiter ed., 1961).

Too much deference, however, threatens to deflate the power of judicial review itself. One of the jobs of the Court is to ensure that majorities do not exceed the Constitution by oppressing unpopular minorities. *Byrd*, 521 U.S. at 829 ("The irreplaceable value of [judicial review] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action" (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring)).); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29, 69 (1985) (rationality review should "ensure that disparate treatment is justified by reference to something other than an exercise of political power by those benefitted"). In *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall explained that courts could not entirely defer to decisionmakers, but should carefully scrutinize government policies to ensure that they are not "pretext[s] . . . for the accomplishment of objects not intrusted to the government." *Id.* at 423. Deference is especially inappropriate where the democratic process cannot be relied upon to protect the rights of the minority. *Carolene Products, supra*; *Compare, Beach Communications*, 508 U.S. at 314 (deferential standard of review is appropriate where Court " 'presumes that . . . improvident decisions will eventually be rectified by the democratic process . . . .' " (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979))).

In some cases, a deferential standard of review is appropriate to avoid imposing impossible burdens on administrators. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (deference appropriate because "[j]udges are not experts in the

field, and are not part of either political branch of the Government . . . [and] it is entirely appropriate for this political branch of the Government to make such policy choices . . . ."). But even under the most deferential standard of review, the Court "insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996). The Court cannot completely defer to administrative decisions, especially when it comes to racial distinctions. *Cf. City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448-50 (1985) (deference inappropriate where administrative decision based on irrational prejudice).

In *Turner v. Safley*, 482 U.S. at 89, this Court held that prison regulations are, as a rule, subject to a type of rational basis scrutiny. *Turner* based this conclusion on the fact that higher standards of scrutiny would "hamper [prison officials'] ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration," and would "distort the decisionmaking process." *Id.*

Yet this Court has also disclaimed the suggestion that prisoners shed all their rights when they are imprisoned. *Shaw v. Murphy*, 532 U.S. 223, 228-29 (2001). Indeed, "[i]nmates retain . . . the right to be free from racial discrimination." *Id.* (citing *Lee v. Washington*, 390 U.S. 333 (1968) (per curiam)). Further, the Court has asserted that *all* governmental action based on race is subject to strict scrutiny. *Adarand*, 515 U.S. at 227.

The Court might reconcile these two positions if it finds that the California racial separation scheme is narrowly tailored to advance a compelling government interest. The Court might find that preventing imminent racial violence is a compelling government interest. *See, e.g., Lee, supra; Croson*, 488 U.S. at 521 (Scalia, J., concurring in judgment); *Grutter*, 123 S. Ct. at 2352 (Thomas and Scalia, JJ., dissenting). And it might find that the race separation policy at issue here meets the criteria of

narrow tailoring set forth in *United States v. Paradise*, 480 U.S. 149, 171 (1987). Or, the Court might find that a nonimminent threat of violence does not establish a compelling state interest, and that the policy does not take sufficient account of "particularized circumstances," to satisfy the narrow tailoring requirement. *Lee,* 390 U.S. at 334 (Black, Harlan, Stewart, JJ., concurring). Amicus Pacific Legal Foundation takes no position on this issue. But in either case, the Court should not further erode strict scrutiny, either by employing *Turner*'s rational basis standard here or by deferring to prison officials in the style of *Grutter*.

Holding that prisoners may be segregated by race simply to avoid interfering with the "inordinately difficult undertaking" of running a prison, *Turner*, 482 U.S. at 85, would threaten the Court's half-century tradition of suspicion toward race-based classifications. There is no principled reason why such deference would not be accorded to any other government agency, whose undertaking is also inordinately difficult, such as the military—*but see Watkins v. United States Army*, 875 F.2d 699, 729 (9th Cir. 1989) (Norris, J., concurring) ("Today, it is unthinkable that the judiciary would defer to the Army's prior 'professional' judgment that black and white soldiers had to be segregated to avoid interracial tensions")—or for that matter, a public school. *But see Brown, supra.*

Avoiding further deterioration of strict scrutiny, and ensuring that it is applied in *every* case of racial discrimination by the government, is vital if this Court is to ensure that racial distinctions are not a permanent feature in American life. The Court should apply a meaningful analysis under the strict scrutiny standard required by *Korematsu* and *Adarand.*

III

THE PROPER ANALYSIS MUST FOCUS ON THE GENUINENESS OF THE DANGER OF RACIAL VIOLENCE

According to *Turner*, 482 U.S. at 89, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." According to *Adarand*, however, "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." 515 U.S. at 227. Reconciling these two positions requires addressing the "legitimacy" of the penological interest at issue in this case. That, in turn, means that courts should independently weigh the state's evidence that segregating inmates by race is actually a necessary and proper way of solving race-based conflicts in prisons. *See, e.g., Cruz v. Beto*, 405 U.S. 319, 321 (1972) ("We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs . . . . But . . . racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for 'the necessities of prison security and discipline'" (quoting *Lee*, 390 U.S. at 334).). Such an approach keeps the burden of proof on the state, where it belongs under a strict scrutiny standard. Also, it ensures that the Court's focus is on the actual necessity and propriety of the prison regulation, rather than on the burdens faced by, or the expertise of, prison officials. Deferring to such burdens or such expertise is too broad a rationale, and would permit the state to engage in pretextual racial discrimination. The requirement of equal protection should not be escaped simply because complying with it is too burdensome. *See Bounds*, 430 U.S. at 825 ("the cost of protecting a constitutional right cannot justify its total denial").

Independently analyzing the necessity and propriety of the race-based classification would permit the Court to ensure that

California's prisons obey the Equal Protection Clause. This Court has employed such independent scrutiny before. In *Pell v. Procunier*, 417 U.S. 817, 822-25 (1974), the Court independently weighed the validity of a regulation of prisoners' access to news reporters. And in *Bounds*, the Court held that prisons must provide adequate access to legal research materials, despite the state's argument that this requirement would interfere with prison administration. "[J]udicial restraint is often appropriate in prisoners' rights cases," the Court noted, but "we have also repeatedly held that this policy 'cannot encompass any failure to take cognizance of valid constitutional claims.'" 430 U.S. at 832 (quoting *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)).

Deference to prison authorities, by contrast, could ratify patently unconstitutional practices. For example, in *Nichols v. McGee*, 169 F. Supp. 721, 723 (N.D. Cal. 1959), the Plaintiff alleged that he was "subjected to systematic segregation, discrimination and degradation solely on account of his race," because he was "lodged in an exclusively Negro cell within [the] cellblock . . . required to join an exclusively Negro line when proceeding into the prison dining halls . . . [and] required to eat in a walled-off and exclusively Negro compartment in said dining halls." The court, however, deferred to the prison officials because "[f]ederal courts have long been loath to interfere in the administration of State prisons," *id.* at 724, and dismissed the complaint for not showing "a sufficiently grave and substantial interference with any right of plaintiff, which reaches such constitutional magnitude as would justify the intervention of this Court." *Id.* at 725. Such a holding is unimaginable today. *Nichols*, like *Korematsu*, demonstrates that an overly deferential standard of review is simply incapable of protecting Americans from racial discrimination.

CONCLUSION

Strict scrutiny is the appropriate standard of review in all cases of government discrimination based on race. Such scrutiny should not defer to the abilities of, or the burdens on, prison authorities. Rather, the burden should be on the state to establish to the Court's independent judgment that the race-based policy is both necessary and proper. Amicus Pacific Legal Foundation therefore urges this Court to hold that strict scrutiny must apply to all instances of race-based classification by the government.

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